IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5412

JOHN R. DILLARD and WILLIE WILLIAMS, individually, and on behalf of all other persons similarly situated,

Appellants,

—v.—

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, ROBERT P. JOYNER, Commissioners of the Industrial Commission of Virginia, and AETNA CASUALTY AND SURETY COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

APPELLANTS' REPLY BRIEF TO THE AMERICAN INSURANCE ASSOCIATION AND THE AMERICAN MUTUAL INSURANCE ALLIANCE AS *AMICUS CURIAE*

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ARGUMENT

I.

Appellants Are Seeking Notice and the *Opportunity* for a Prior Evidentiary Hearing

The *Amici* for the insurance industry have set up a straw man and then proceed to demolish it. Throughout their brief they have framed their arguments against a position which appellants have not taken. They state that the appellants:

> insist that nothing short of a full evidentiary hearing in every case prior to the suspension of benefits will satisfy the requirements of due process.

(Brief of The American Insurance Association and The American Mutual Insurance Alliance as *Amicus Curiae* p. 19) (hereinafter referred to as Brief for AIA; see also, Brief for AIA, pp. 3, 7, 27-28). The appellants have, of course, never taken such a position.

From the inception of this case the appellants have contended that due process requires only notice and the *opportunity* for a prior evidentiary hearing. (App. 55, 63, 72, 73; and Brief for Appellants 2, 7, 8, 25).

The *Amici* maintain that in Massachusetts the workmen's compensation system "requires a hearing in almost every instance prior to termination." (Brief for AIA, p. 7). Here again they are mistaken, since they state in their Brief (p. 8, n.2) that 95% of workmen's compensation claims nationwide are settled voluntarily, and then use a study in support of their statement about the Massachusetts system which says:

> Compensation, once commenced, cannot be discontinued by the insurer *in the absence of the written assent of the employee.* (Emphasis added).

Brooke, *Administering Workmen's Compensation Cases in California, Florida, Massachusetts, New Jersey, New York and Wisconsin,* in Volume III, *Supplemental Studies for the National Commission on State Workmen's Compensation Laws,* p. 80 (1973). They also mistakenly state that in Massachusetts the opportunity for a hearing has "resulted" in a backlog of 8,000 to 9,000 cases. (Brief for AIA, p. 7). The 8,000 to 9,000 case backlog is made up of all cases before the Massachusetts Industrial Accident

Board including cases where there is a dispute over initial compensation and cases where the employee is requesting reinstatement. (*Id.* at 80-81). Therefore, the statement that the backlog is the "result" of the worker having the opportunity for a prior hearing is clearly not supported by the study.

II.

The Alleged Guidelines for the Probable Cause Determination Do Not Provide Due Process

The *Amici* have set out, on pages 13-16 of their Brief, a procedure which they say is used by the Commission in its probable cause determination under Rule 13. This procedure is completely unsupported by any documentation and is directly contrary to the facts in the record of this case, and the recent decisions of the Commission.

The *Amici* start out by saying that the Rule 13 procedure will not be instituted unless "the employee will not agree to a termination of benefits." (Brief for AIA, p. 13). This is in direct conflict with the facts of Appellant Williams' case where Travelers Insurance Company (the second largest workmen's compensation carrier in the country, Brief for AIA, p. 8, n.3) sent the request for a hearing to the Commission with a copy of the same letter being sent to Mr. Williams requesting his agreement to terminate the benefits. (App. 75). This large carrier starts the Rule 13 procedure simultaneously with its attempt to find out whether the worker will agree to termination.

Next they say the worker can file "a written statement or submit evidence." Again, in Mr. Williams' case he could not submit evidence since by the time he received his "notice" the probable cause determination had already taken

place. (App. 75). Assuming, *arguendo,* that it is the Commission's policy to allow the worker to submit evidence, they are obviously keeping it a secret. No one tells the injured worker. Even worse than not telling the worker, the Commission allows a carrier to send a notice to an injured worker which is deceptive. The notice to Mr. Williams implied that there would be no disadvantage to him in acknowledging that he is better and trying to go back to work since he can always request a hearing. (App. 75) (Reply Brief for Appellants, Argument V).

Throughout this hypothetical procedure the Commission is communicating with the carrier (Brief for AIA, p. 14), whether in writing or by phone we are not told, but the worker is never given a copy of any letters or a phone call to inform him of what is happening.

One then comes to what the *Amici* allege are the five "guidelines" used by the Commission for their probable cause determination. (Brief for AIA, pp. 15-16). One of the major deficiencies of each of the alleged "guidelines" is that there is no contact with the worker, although there is often contact with the insurer. (Brief for AIA, p. 14).

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

Joint Anti-Fascist Refugee Committee v. *McGrath,* 341 U.S. 123, 170 (Frankfurter, J., concurring). Take, for example, guideline 3 (Brief for AIA, p. 15) which deals with the situation where a worker, who the carrier admits is still at least partially disabled, has allegedly refused employment "suitable to his capacity." Section 65.1-63, Code of Virginia of 1950, as amended. The guideline requires that "the carrier must find the employee an appropriate job." (Brief for AIA, p. 15). If the carrier does not

include such a statement in its application, the Commission will inform the carrier of this deficiency (Brief for AIA, p. 14), and by return mail, one assumes, will come the carrier's statement about finding a job for the injured worker. The Commission informs the worker of none of this. The worker is unable to offer evidence to the effect that no job was offered; or that the employer the carrier said would hire him in fact would not; or that the job which was actually offered was not as stated by the carrier and was not within "his capacity." See, *e.g., Haynie* v. *The Whiting-Turner Contracting Co.*, —— OIC ——, Claim Number 310-296 (September 13, 1973); *Boyce* v. *Dodson Brothers Exterminating Co.*, —— OIC ——, Claim Number 257-731 (October 17, 1973); and *Moyer* v. *Virginia Oak Tannery, Inc.*, 54 OIC 286 (1972). Surely the most fundamental notions of fairness would dictate that, when the Commission contacts the carrier with what is in effect a request for additional information, the Commission would also keep the injured worker apprised of what is happening to allow him to present his side.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination . . .

Greene v. *McElroy*, 360 U.S. 474, 496.

Each of the other four alleged guidelines (Brief for AIA, pp. 15-16) as the discussion below will show, also fail to provide the injured worker with the fundamental fairness and integrity which the constitution mandates. *Richardson* v. *Perales*, 402 U.S. 389, 410.

Guideline 1. The probable cause determination is made on the basis of a doctor's report which indicates that the worker is able to go back to work, or will be able to do so in one week. (Brief for AIA, p. 15). The worker is not given notice and a reasonable opportunity to submit his own evidence. Contrary to what the *Amici* contend (Brief for AIA, pp. 17-18, 26-27), the record clearly shows (App. 14) that Mr. Dillard would still have had his benefits suspended under this "guideline" and, of course, Mr. Williams' case arose under this new system. The numerous cases which the Commission continues under this guideline to have to reverse on the grounds of conflicting medical evidence show that this is not an uncommon occurrence. See, *e.g.*, *Jefferson* v. *Scott Pallets, Inc.*, —— OIC ——, Claim Number 279-184 (December 19, 1973); *Rasnake* v. *Clinchfield Coal Co.*, —— OIC ——, Claim Number 251-319 (November 27, 1973); *Crooke* v. *Vecco Concrete Construction, Inc.*, —— OIC ——, Claim Number 305-226 (November 26, 1973); *Ball* v. *Clinchfield Coal Co.*, —— OIC ——, Claim Number 226-684 (October 24, 1973); *Woodson* v. *Hark Manufacturing Co.*, —— OIC ——, Claim Number 233-401 (October 12, 1973); *Rector* v. *Martin & Gass, Inc.*, —— OIC ——, Claim Number 253-230 (October 26, 1973); *Fredericks* v. *S. Klein Department Stores, Inc.*, —— OIC ——, Claim Number 254-301 (October 29, 1973); *Ratcliff* v. *Estes Express Lines*, —— OIC ——, Claim Number 281-157 (August 21, 1973); and *Taylor* v. *A. H. Robins Co.*, —— OIC ——, Claim Number 213-692 (August 27, 1973).

Contrary to the assertion that an *ex parte* determination based on only one side's secret medical reports is "a practice specifically upheld by this Court in *Richardson* v. *Perales*" (Brief for AIA, p. 27), in that case the Court stated:

> We are not concerned with termination of disability benefits once granted. Neither are we concerned with a change of status without notice. . . . The physicians' reports were on file available for inspection by the claimant and his counsel. And the authors of those reports were known and were subject to subpoena and to the very cross-examination that the claimant asserts he has not enjoyed.

Richardson v. *Perales*, 402 U.S. 389, 407.

Also, to allow a doctor to predict the course of recovery by saying the worker is disabled now but in a week he will be able to return to work, is giving to the medical profession a prescience which is not warranted. This is especially true where the worker is not allowed the opportunity to see the report and present evidence to the contrary.

Guideline 2. The probable cause determination is made on the basis of the employer's or carrier's statement that the employee has returned to work. (Brief for AIA, p. 15). This determination would not allow the worker to present evidence to the effect that the work he has been able to do brings him less than his preinjury wages and therefore he is eligible for partial disability, or that he in fact has not gone back to work.

Guideline 4. The probable cause determination is made on the basis of a doctor's statement that the worker has refused to cooperate. (Brief for AIA, pp. 15-16). The only example which is given in the guideline is that of the failure to keep appointments. Since the statute requires *unjustified*

refusal, Section 65.1-88, Code of Virginia of 1950, as amended, the worker, if given the opportunity, might be able to show a justifiable reason for missing the appointments. See, *e.g., Diggins* v. *Grace & Co.,* 46 OIC 66 (1964) (failure of employer or carrier to provide transportation expenses); *McAdoo* v. *Meadowbrook Country Club,* 53 OIC 175 (1971) (claimant lived alone with no one to care for her so she went to mother's house out of state).

This "guideline" fails to give other examples of what carriers in cases before the Commission have maintained are unjustified refusals of medical treatment, such as Appellant Dillard's refusal to have another operation to remove his "right testicle and cord" (App. 15, 17), or Mr. Thompson's refusal to submit to back surgery after he had already undergone three major surgical procedures without relief of back pain. *Thompson* v. *The United Piece Dye Works,* 54 OIC 379 (1972). See also, *Terrell* v. *Lawrence Transfer & Storage Corp.,* —— OIC ——, Claim Number 155-702 (November 28, 1973); *Dial* v. *Auto Bumper Plating, Inc.,* —— OIC ——, Claim Number 261-089 (September 27, 1973); *Tharpe* v. *Virginia Baptist Home, Inc.,* 54 OIC 372 (1972).

There are unlimited variations on both the type of medical treatment recommended and a person's legitimate justification for not taking such treatment. This type of situation is perhaps the clearest example in workmen's compensation law of why the adjudicatory fact-finding function cannot proceed by a check-list approach like that set out in the guidelines. One is attempting to determine whether an individual is justified in not having something, possibly very drastic, done to him. There are just too many factors for the finder of fact to consider not to allow the worker the opportunity to present his side of the case.

Guideline 5. The probable cause determination is made on the basis of the employer's or carrier's statement that the worker cannot be located. (Brief for AIA, p. 16). This type of situation is probably the only one where there is merely a simple yes or no answer. *Fuentes* v. *Shevin,* 407 U.S. 67, 100 (White, J., dissenting). But in such situations the only harm done by granting the relief appellants seek is the administrative and bookkeeping expense of having to put the benefit checks, which have been returned by the Post Office, back into the carrier's account. There will, however, be the benefit of uninterrupted compensation to the injured workers who the carrier mistakenly believes cannot be located. Such mistakes are inevitable in any high volume system such as workmen's compensation.

Finally, the "guidelines" do not in any way protect the injured worker from the harm done by being forced back to work too soon or into unfavorable lump-sum settlements. (Reply Brief for Appellants, Argument IV).

Respectfully submitted,

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March, 1974

DILLARD ET AL. v. INDUSTRIAL COMMISSION OF VIRGINIA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 73-5412. Argued March 26, 1974—Decided May 15, 1974

In this action (brought initially by appellant Dillard and in which appellant Williams was allowed to intervene) Williams claimed that the Due Process Clause of the Fourteenth Amendment prevented Virginia from permitting suspension of workmen's compensation benefits as a result of a claimed change in condition without notice to the claimant and a prior adversary hearing. The District Court rejected the constitutional claim on the merits. *Held:* If, as indicated in the briefs and oral arguments in this Court, state law permits a claimant whose benefits have been suspended to have them reinstated by the state trial courts, which act in a purely ministerial capacity, pending a full administrative hearing before the State Industrial Commission on the merits of his claim, it was probably unnecessary to address the federal constitutional question. Accordingly, the case must be remanded to the District Court for reconsideration. Pp. 784-798.

347 F. Supp. 71, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 799.

John M. Levy argued the cause for appellants. With him on the briefs was *George S. Newman*.

Stuart H. Dunn, Assistant Attorney General of Virginia, argued the cause for appellees Industrial Commission of Virginia and individual Commissioners. With him on the brief were *Andrew P. Miller*, Attorney General, and *William E. O'Neill, Jr.* *J. Robert Brame III* argued the cause for appellee Aetna Casualty & Surety